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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 576

*petition
not printed*

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.*
DAVID TRACHER,

Petitioner,

against

WALTER B. MARTIN, Warden of Attica State Prison,
Attica, New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

✓ NATHANIEL L. GOLDSTEIN,
*Attorney-General of the State
of New York,
Attorney for Respondent,
The Capitol,
Albany 1, N. Y.*

WENDELL P. BROWN,
Solicitor General,

PATRICK H. CLUNE,
Assistant Attorney-General,

IRVING I. WAXMAN,
*Deputy Assistant Attorney-General,
of Counsel.*

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**BRIEF IN OPPOSITION TO PETITION
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Statement

The petitioner prays for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, entered in the office of the Clerk of Wyoming County, N. Y. on December 7, 1944, which order unanimously reversed an order of the Wyoming County Court of the State of New York, entered in the Wyoming County Clerk's Office on October 9, 1943, dismissed petitioner's writ of habeas corpus and remanded him to the custody of respondent as Warden of

Attica State Prison, Attica, New York. The Memorandum Opinion of the Supreme Court, Appellate Division, is reported in 268 N. Y. App. Div. 955.

No appeal to the New York State Court of Appeals was taken from said order of reversal of the New York Supreme Court, Appellate Division, Fourth Judicial Department.

Subsequently, and by order entered February 27, 1946, a writ of habeas corpus obtained by petitioner was dismissed by the Wyoming County Court of the State of New York; and by order entered June 7, 1946 a writ of habeas corpus obtained by petitioner was dismissed by the Supreme Court of the State of New York, held in and for Wyoming County. No appeal was taken from either of these subsequent orders of dismissal.

Facts

Petitioner was convicted by the County Court of Erie County of the State of New York on a plea of guilty to the crime of Grand Larceny, second degree, on October 20, 1936, and was sentenced to an indefinite term of five to ten years in Attica State Prison as a second felony offender. Due to the completion of service of a previous prison sentence before commencing service of the sentence for the Grand Larceny conviction, and also because of additional time owed for parole time prior to violation of parole, petitioner's maximum sentence will not expire until August 5, 1949.

The sole contention upon which petitioner's petitions for writs of habeas corpus have been based is that his conviction was not valid because although he had pleaded guilty to the crime of Grand Larceny, second degree, the only crime for which he had been indicted was Burglary, third degree.

ARGUMENT

As a matter of law petitioner is not entitled to a writ of certiorari.

This Court may review upon a writ of certiorari a final judgment or decree in any suit "in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity * * *." (28 U. S. C. § 344).

Petitioner prays for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, which is not the highest court of the State of New York. Nor is there any federal question involved over which this Court can take jurisdiction.

Petitioner, as a matter of right, could have appealed to the New York State Court of Appeals, the highest court in the State, from the order of reversal of the Appellate Division of the New York State Supreme Court (N. Y. Civil Practice Act §§ 1274, 588 [c]). Petitioner did not avail himself of such right and the time to do so has long since expired (N. Y. Civil Practice Act § 592).

Aside from the above stated jurisdictional defect, there is no merit to petitioner's contention. The order of reversal of the Appellate Division of the New York State Supreme Court was founded upon the decision of the New York State Court of Appeals in the case of *People ex rel.*

Wachowicz v. Martin, 293 N. Y. 361, which was decided by the Court of Appeals while the appeal to the Appellate Division of the Supreme Court in the case at bar was pending. In the *Wachowicz* case the Court of Appeals was confronted with the identical question presented by the instant case, and held that habeas corpus is not the proper remedy to question the validity of the action of the sentencing court in this type of case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be dismissed.

Dated, November 1, 1946.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State
of New York,
Attorney for Respondent,
The Capitol,
Albany 1, N. Y.

WENDELL P. BROWN,
Solicitor General,
PATRICK H. CLUNE,
Assistant Attorney-General,
IRVING I. WAXMAN,
Deputy Assistant Attorney-General,
of Counsel.